

Vol. 23 No. 1

February 13, 2015

# PUBLIC SHOULD SCRUTINIZE FEDERAL DIETARY GUIDELINES' SUPPORT FOR NEW REGULATIONS

by

Richard L. Frank and Bruce A. Silverglade

The *Dietary Guidelines for Americans* is the federal government's official advice on healthy eating that is issued every five years by the U.S. Department of Agriculture (USDA) and the Department of Health and Human Services (HHS).<sup>1</sup> The Guidelines are supposed to be an objective, science-based document that consumers can use to improve their diets. But, the Obama Administration's 2015 *Dietary Guidelines*, now under development, seem destined to be used to pursue an ideologically-charged nutrition policy agenda.

The process for developing the 2015 *Dietary Guidelines* started with the appointment of a federal advisory committee. The Dietary Guidelines Advisory Committee (DGAC), operating through five subcommittees and three working groups dedicated to specific topics, met throughout 2014. The DGAC is now preparing to release its final report. USDA and HHS will make the final decisions on what the *Guidelines* themselves will say, but the Advisory Committee report can heavily influence the outcome.

Be prepared—in all likelihood, the DGAC report will be stuffed with politically-driven recommendations favoring food marketing restrictions and related regulatory policies, but will come up significantly short on the type of nutrition advice that consumers could genuinely use.

Sugar may soon be ground zero in the Administration's attack plan. "Added Sugars" are the bête noire of certain public health nutritionists appointed by the White House to positions of power. Although sugars added to processed foods are no different from sugars that occur naturally in foods,<sup>2</sup> the DGAC report will likely home in on them as public enemy #1 in the American diet. Proceedings of a DGAC working group<sup>3</sup> reveal that the Committee's report will call for a host of new federal, state, and local regulatory programs to control Americans' sugar consumption including "economic and pricing approaches," e.g., a sugar tax. Also included among those recommendations is a regulatory requirement that companies be required to disclose the amount of sugars they add to processed foods on the labels of products sold in grocery stores.

Not coincidentally, the Food and Drug Administration (FDA) has issued a proposed regulation to require food companies to disclose "Added Sugars" content on food labels.<sup>4</sup> The proposed regulation lacks a sound scientific basis given that added sugars are chemically identical to natural sugars. Further, as many commentators have observed, including two former directors of FDA's food labeling office, an "Added

---

<sup>1</sup> The National Nutrition Monitoring and Related Research Act of 1990, Public Law 101-445, 101<sup>st</sup> Congress, Oct. 22, 1990, codified at 7 USC § 534.

<sup>2</sup> FDA acknowledges the National Academy of Sciences Institute of Medicine's finding that ". . . added sugars are not chemically different from naturally occurring sugars . . ." See 79 Fed. Reg. 11880, 11903, Reference 68.

<sup>3</sup> See <http://www.health.gov/dietaryguidelines/2015-BINDER/meeting7/docs/DGAC-Meeting-7-Cross-Cutting-Topics.pdf>.

<sup>4</sup> See 79 Fed. Reg. 11880 at 11969.

---

**Richard L. Frank** is a Founding Principal, and **Bruce A. Silverglade** is a Principal, with the law firm Olsson Frank Weeda Terman Matz PC.

Sugars” disclosure on the food label may actually mislead consumers<sup>5</sup> contrary to FDA’s statutory mandate to *prevent* misleading labeling. Further, FDA’s proposed rule raises serious concerns under the First Amendment doctrine limiting the right of government to compel speech.<sup>6</sup>

The agency is also stymied by the results of a consumer research study sponsored by the International Food Information Council (IFIC).<sup>7</sup> That study demonstrates that more than half of consumers would not understand the meaning of the agency’s proposed “Added Sugars” labeling disclosure.

FDA has conducted its own consumer research<sup>8</sup> but according to agency officials, is still “analyzing” the results. That means the agency may be struggling with how to spin the results of its study (congressional committees with FDA jurisdiction should request and examine the raw data as part of their oversight responsibilities). Regardless of what FDA’s study may show, the agency has ominously conceded that a consumer education program will be necessary to prevent consumers from being confused and misled by the new disclosure.<sup>9</sup> But the agency has previously tried to educate consumers on how to use key elements of nutrition labeling with little success.<sup>10</sup>

The FDA proposed rule may be headed for trouble, but in the Administration’s playbook, the DGAC report will shore up support for the agency’s “Added Sugars” labeling proposal. White House efforts to place regulatory advice in the *Dietary Guidelines for Americans* prior to the completion of a full analysis and public vetting of the FDA research study is a good example of how political science can trump sound science. Whether the DGAC working group responsible for sugar was shown the results of FDA’s study is unclear. At best, the DGAC working group responsible for the “Added Sugars” labeling recommendation simply shot from the hip and issued its recommendation without reviewing the FDA’s data. At worst, the DGAC working group was shown the data, but chose to barge ahead on ideological grounds regardless of what the research showed. In any event, FDA will likely attempt to use the DGAC recommendations to bootstrap the publication of a final regulation even though consumer education programs can’t fix confusing food label disclosures.

Congress foresaw this type of problem when it enacted legislation setting up the internal government process for the development of the *Dietary Guidelines*. Title II, Section 301(b)(3) of The National Nutrition Monitoring and Related Research Act of 1990 states that the term “dietary guidance does not include any rule or regulation issued by a Federal Agency.”<sup>11</sup> Given this limitation, it is clear that the DGAC’s express recommendations for the issuance of the FDA regulation on added sugars labeling is inconsistent with the purpose and intent of the law.

The DGAC report and FDA’s consumer study (according to promises by Agency officials) will be put out for public comment. Concerned stakeholders should take full advantage of these opportunities to set the record straight.

---

<sup>5</sup> Comment to FDA from Barbara O. Schneeman, Ph.D., Professor Emeritus, University of California, Davis, Aug. 1, 2014, at 4, 8 (Former FDA Director of the Office of Nutrition, Labeling, and Dietary Supplements); Comment to FDA from F.E. Scarbrough (undated—submitted prior to August 1, 2014 comment period deadline), at 6 -7 (Former FDA Director of Office of Food Labeling).

<sup>6</sup> See Richard L. Frank and Bruce A. Silverglade, *FDA’s ‘Added Sugars’ Labeling Mandate Raises First and Fourth Amendment Concerns*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt.), Sept. 26, 2014, available at

[http://www.wlf.org/upload/legalstudies/legalbackgrounder/092614LB\\_FrankSilverglade.pdf](http://www.wlf.org/upload/legalstudies/legalbackgrounder/092614LB_FrankSilverglade.pdf).

<sup>7</sup> See <http://www.foodinsight.org/newsletters/news-bite-ific-foundation-consumer-research-informs-fda-proposed-changes-nutrition>.

<sup>8</sup> See 79 Fed. Reg. at 11905.

<sup>9</sup> FDA acknowledges that, if finalized, a requirement for declaration of added sugars on the Nutrition Facts label “will need to be accompanied by consumer education on the role of added sugars, along with solid fats, and the use of new information on the label in overall dietary planning.” 79 Fed. Reg. at 11905.

<sup>10</sup> See 79 Fed. Reg. at 11887.

<sup>11</sup> The National Nutrition Monitoring and Related Research Act of 1990, *supra* note 1.